In the Supreme Court of the United States

OCTOBER TERM 1956

UNITED STATES OF AMERICA

Appellant

VS.

CHARLES T. HVASS

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

THE QUESTION IS NOT SUBSTANTIAL

I. The government first argues that the common law power of courts to exact an oath from witnesses in a judicial proceeding is "a law of the United States authoriz[ing] an oath to be administered" within the meaning of 18 U. S. C. §1621. Indeed, in its Conclusion this is the only question the government claims to be substantial. (Juris. St. 8.) The soundness of this claim of common-law or inherent power is irrelevant to disposition of the present case.

The District Court expressly found:

> Administration of the oath to Hvass was not a part of any judicial proceeding in the Wyrum and Nash cases, but rather was a part of an administrative proceeding by which the court sought to determine whether Hvass should be permitted to participate as an attorney in these cases.

147 F. Supp. at 595, Juris. St. 11. This conclusion, that the proceeding was administrative rather than judicial, is amply supported by the authorities. *Brooks v. Laws*, 208 F. 2d 18 (D. C. Cir. 1953); *Application of Wasserman*, 240 F. 2d 213, 214 (9th Cir. 1956); *People ex rel. Karlin v. Curlin*, 248 N. Y. 465, 479, 162 N. E. 487, 492 (1928); *Rosenthal v. State Bar Examining Committee*, 116 Conn. 409, 415-6, 165 Atl. 211, 213 (1933). And in any event, this construction of the indictment by the District Court, that it charges a false statement in an administrative rather than a judicial proceeding, is conclusive on this Court. *United States v. Borden Co.*, 308 U. S. 188, 193 (1939); *United States v. Carbone*, 327 U. S. 633 (1946).

Thus the government's arguments that "the authority is implicit in the judicial power" and that "the question in the instant case is whether the inquiry made was within the scope of the judicial power or competence" (Juris. St. 7) miss the mark. The District Court has held, correctly, that it was not purporting to exercise its judicial power when it examined defendant. It was acting administratively, and a false statement under oath in such an administrative proceeding is not a violation of 18 U. S. C. §1621 unless some "law of the United States" authorizes administration of the oath in such a proceeding.

A compelling analogy can be found in a state prosecution under a statute similar, for present purposes, to 18 U. S. C. §1621. Defendant on a drunken driving charge

had pleaded guilty. The judge, prior to sentencing him, administered an oath and examined him as to prior arrests. It was claimed that he testified untruthfully on this subject. But it was held that he could not be prosecuted for perjury for these supposed untruths. *State v. Larson*, 171 Minn. 246, 213 N. W. 900 (1927). The Minnesota Supreme Court reasoned that no statute authorized post-conviction examination of a defendant, and that the testimony in question was, therefore, extra-judicial. Nor could the perjury indictment be sustained by the court's power to administer an oath during trial, since that power had terminated with the plea of guilty.

For a clear holding that a federal judge does not have a roving commission to examine anyone on any subject, and that his jurisdiction is limited to that granted by statutes and rules, see *Ex parte Fisk*, 113 U. S. 713 (1885).

Inherent power to administer oaths in judicial proceedings does not demonstrate inherent power to administer oaths in administrative proceedings. The government is able to find a substantial question in the present case only by overlooking the District Court's explicit statement that it was acting administratively, rather than judicially, when it examined appellee under oath.

II. The government also claims that there is a question, worthy of consideration by this Court, as to the thrust of Local Rule 3 of the Northern and Southern Districts of Iowa. The short of the matter is that, while there might have been such a question, it was not passed on in the trial court and is not, therefore, before this Court.

In *DeParcq v. United States District Court*, 235 F. 2d 692, 699 (8th Cir. 1956), the Court of Appeals for the Eighth Circuit said:

> Rule 3 is vigorously assailed as being arbitrary, discriminatory, unreasonable, destructive of the rule of comity and ex post facto. We, however, deem it unnecessary to pass upon the validity of this rule * * *.

A similar challenge was made to Local Rule 3 in the trial court in the present case. The validity of this rule, which the District Court correctly characterized as "unique and unusual," 147 F. Supp. at 597, Juris. St. at 14, does indeed pose questions of no little interest. But the trial judge specifically said:

> * * * it is not necessary for me to pass upon this question.

147 F. Supp. at 597, Juris St. at 15. Thus the question of validity of the rule is not before this Court.

All that is before the Court is a construction which a District Court has placed on a rule which the District Court made. Validity of a lower court rule is undoubtedly a question on which this Court can pass, but the meaning of a lower court rule is defined authoritatively by the court which made it. The same reasons which require this Court to accept the reading a state court gives to a state statute require it to accept the reading a District Court gives to a District Court rule.[1]

From time out of mind courts have construed statutes and rules in a restrictive manner in order to avoid otherwise serious questions as to their validity. This may well have been the reason for the District Court's action in the present case. For the court defines the purpose of Local Rule 3, and says that this perjury indictment comes "after

[1] Nor does it alter the matter that in this case the District Court for the Northern District of Iowa spoke through a judge of another district, sitting by designation. A judge sitting by designation may hold a District Court rule invalid. *Johnson v. Manhattan Co.*, 289 U. S. 479, 503 (1933). *A fortiori* he must be able to construe such a rule.

Rule 3 had served its purpose." 147 F. Supp. at 597, Juris. St. 14. And the court goes on to say again:

> "The purpose of the rule was accomplished when Hvass was denied the right to participate in the Wyrum and Lash cases and if disciplinary action against the defendant Hvass is deemed advisable such action should be instituted in the regular manner."

147 F. Supp. at 597, Juris. St. 15.

We have, then, an authoritative construction of Local Rule 3 by the only tribunal competent to construe that rule that the rule was not intended to serve as a predicate for a perjury prosecution. The purpose of the rule is to determine the fitness of lawyers seeking to appear in that court, and that purpose is here held to have been accomplished.

There is nothing extraordinary about requiring testimony to be under oath though it is no subject to the perjury-penalty. Oral depositions in civil cases are taken under oath, F. R. Civ. P. 30(c), though only false testimony as to material matters is punishable as perjury, 18 U. S. C. §1621, and examination on a deposition is not limited by the concept of materiality. *2 Barron & Holtzoff, Federal Practice and Procedure*, 311-2 (1950). Wigmore gives other examples of testimony which is taken under oath and admissible in a judicial proceeding, though it is not subject to the perjury penalty. *6 Wigmore, Evidence* §1832 (3d Ed. 1940).

It is recognized, of course, that a decision that a particular administrative regulation is or is not a "law of the United States" within the meaning of the perjury statute is, technically, a construction of the statute, and gives jurisdiction to this Court under the Criminal Appeals Act. *United States v. George*, 228 U. S. 14 (1913). But we do not have here any antedeluvian claim that an administra-

tive regulation can never be a law. Indeed the trial court expressly acknowledged that "generally speaking a rule of court has the force of law." 147 F. Supp. at 597, Juris. St. 14. Only the other day this Court reaffirmed earlier holdings that a regulation "may or may not" be "a 'law' for purposes of criminal prosecutions," depending on the structure of the particular statute. *United States v. Howard*, 352 U. S. 212, 216 (1957). And the Court thought it relevant to note the intention of the Florida legislature in determining whether violation of a Florida regulation gave rise to a federal criminal offense. *Id.* at 216-7. Surely the intention of the District Court must be equally determinative as to whether violation of one of its regulations gives rise to a federal criminal offense. If the District Court for the Northern District of Iowa has the power to expand the concept "a law of the United States" by making a rule, then it must have the power not to expand that concept by not bringing its rule within the concept. This is what it has done here. Its determination of the matter is authoritative and leaves no question worthy of consideration by this Court.

CONCLUSION

The District Court's resolution of the issue of "inherent power" is supported by the authorities, if, indeed, it is open at all in this Court. And its interpretation of Local Rule 3 as not falling within 18 U. S. C. §1621 is within its power to speak authoritatively as to the meaning of a rule it has made itself. It is manifest that the questions on which decision of the present cause depends are so unsubstantial as not to need further argument. The decision below should be affirmed.

Respectfully submitted,

WARREN B. KING
945 Northwestern Bank Bldg.
Minneapolis 2, Minnesota
CHARLES ALAN WRIGHT
301 Townes Hall
Austin 12, Texas
Attorneys for Appellee